publishing joint ventures with such entities. We emphasize, however, that this is only one factor we may consider in determining whether a BOC satisfies the "good cause" standard under section 274(c)(2)(C), and that other circumstances may exist that militate for or against a finding of "good cause." We thus conclude that the issue of what constitutes "good cause" under section 274(c)(2)(C) should be addressed on a case-by-case basis in the context of fact-specific waiver applications.

2) BOC Participation on a "Nonexclusive" Basis

a) Background

177. In the *Notice*, we also sought comment on what regulations, if any, are necessary to ensure that a BOC participates in an electronic [illegible] joint venture on a whereby a BOC participates in an electronic publishing joint venture with an electronic publishing entity to the exclusion of all other such entities.[407] We also sought comment on whether the provision prohibits contracts between a BOC and an electronic publisher whereby the electronic publisher is committed to purchase basic transmission services necessary to provide electronic publishing exclusively from such BOC, or whether the provision contemplates other types of prohibitions.[408]

b) Comments

178. BellSouth, NAA, and NYNEX argue that the "nonexclusive" requirement in section 274(c)(2)(C) precludes a BOC from entering into an electronic publishing joint venture with one entity to the exclusion of all others.[409] PacTel similarly states that a BOC and its affiliate are prohibited under the provision from entering into an agreement that either prohibits other parties from participating in the joint venture or precludes the BOC or its affiliate from participating in other electronic publishing joint ventures with other parties.[410] BellSouth states, however, that a BOC is not obligated to participate in more than one electronic publishing joint venture.[411] BellSouth and NAA also argue that the provision does not preclude a BOC from insisting, as a condition of its participation in the electronic

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406 *Notice* at ¶ 63.

407 *Id.*

408 *Id.*

409 BellSouth at 20; NAA at 9; NYNEX Reply at 11.

410 PacTel at 19-20.

411 BellSouth at 20.

publishing joint venture, that the joint venture purchase basic transmission services exclusively from the BOC in order to provide electronic publishing services.[412] NAA and PacTel contend that the provision does not require an electronic publishing joint venture to be open to all, nor does it prelude a BOC from exercising its business judgment regarding its joint venture partners.[413]

c) Discussion

179. We conclude that the section 274(c)(2)(C) requirement that a BOC or affiliate participate in an electronic publishing joint venture on a "nonexclusive" basis prohibits a BOC or affiliate from entering into an agreement with its joint venture partner that precludes either entity from participating in other such ventures with other parties. The "nonexclusive" requirement in section 274(c)(2)(C) protects against the potential that a BOC could place competing local exchange providers at a competitive disadvantage by preventing its joint venture partners from aligning with such providers in other electronic publishing joint ventures. We note, however, that while section 274(c)(2)(C) of the Act proscribes these types of exclusive arrangements, it does not prevent a BOC from agreeing with its joint venture partner to exclude other parties from that particular venture. In addition, we find that section 274(c)(2)(C) does not require that an electronic publishing joint venture be open to any and all potential venture participants, nor does it preclude a BOC from exercising its business judgment regarding its joint venture partners. As noted above, because an "electronic publishing joint venture" as defined in section 274(i)(5) of the Act, contemplates some degree of BOC ownership, a BOC should be allowed to retain discretion regarding its joint venture partners. Requiring a BOC to take an ownership interest in a joint venture in which it was not free to select its partner would discourage BOCs from participating in such ventures and restrict competition in the provision of electronic publishing services.[414]

180. We also find that the "nonexclusive" requirement in section 274(c)(2)(C) of the Act does not require a BOC or BOC affiliate to participate in more than one electronic publishing joint venture. As BellSouth points out, such an interpretation could be viewed as precluding a BOC from consummating an electronic publishing joint venture arrangement with its joint venture partner until the BOC had located and negotiated with another partner with whom to establish a joint venture.[415] A BOC thus may refuse to participate in a second electronic publishing joint venture that is proposed to it after it has entered into an electronic publishing joint venture with another unaffiliated entity. Given that Congress, in adopting section 274 of the Act, sought to promote competition in the provision of electronic

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[412] BellSouth at 21; NAA at 9.

[413] NAA at 9; PacTel at 19-20; *see also* NYNEX Reply at 11.

[414] *See, e.g.*, discussion of "nondiscriminatory" in the context of teaming arrangements *supra* at ¶ 168.

[415] BellSouth at 20.

publishing services by allowing BOCs to provide such services subject to certain safeguards, we conclude that section 274(c)(2)(C) was not intended to require a BOC to participate in more than one electronic publishing joint venture. Such a requirement could restrict competitive entry into the provision of electronic publishing services by hampering BOC participation in electronic publishing joint ventures.

181. We also conclude that section 274(c)(2)(C) does not preclude a BOC from requiring an electronic publishing joint venture to purchase basic transmission services exclusively from the BOC as a condition of the BOC's participation in the joint venture. The express language of section 274(a) of the Act contemplates the provision by an electronic publishing joint venture of electronic publishing services that are disseminated by means of the BOC or BOC affiliate's basic telephone service. Moreover, nothing in section 274(a) indicates that Congress intended to prohibit a BOC participating in an electronic publishing joint venture from requiring that the joint venture purchase basic telephone service exclusively from the BOC.

3) Interplay Between Section 274(c)(1)(B) and Section 274(c)(2)(C)

a) Background

182. We noted in the *Notice* that the joint marketing prohibitions in section 274(c)(1) of the Act appear not to apply to an electronic publishing joint venture.[416] We also sought comment on the extent to which section 274(c)(2)(C), which allows a BOC to participate in electronic publishing joint ventures under certain conditions, permits a BOC to market jointly with an electronic publishing joint venture in light of other provisions in section 274 that prohibit certain marketing activities.[417] We noted, for example, that section 274(b)(6) prohibits an electronic publishing joint venture from using the "name, trademark, or service marks of an existing [BOC]" for the marketing of any product or service, while section 274(c)(2)(A) permits a BOC to provide inbound telemarketing services for, among other things, an electronic publishing joint venture, but only under certain conditions.[418] In addition, we sought comment in the *Notice* on the distinction, if any, between the term "carry out" in sections 274(c)(1)(A) and (B), which set forth the general marketing prohibitions on BOCs, and the term "provide" in section 274(c)(2)(C).[419]

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[416] *Notice* at ¶ 51.

[417] *Id.* at ¶ 52.

[418] *Id.*

[419] *Id.* at ¶ 53.

b) Comments

183. A number of commenters argue that section 274(c)(2)(C) is an exception to the general joint marketing prohibitions in section 274(c)(1) of the Act and thus permits a BOC to provide promotion, marketing, sales and advertising services to an electronic publishing joint venture.[420] SBC argues that, because section 274(c)(2)(C) authorizes a BOC participating in an electronic publishing joint venture to "provide promotion, marketing, sales, or advertising *personnel and services*," the venture itself may be staffed by BOC marketing and sales personnel.[421] Ameritech argues that joint marketing activities otherwise prohibited under section 274(c)(1) are permitted to the extent they come under one of the three categories of permissible joint marketing activities in section 274(c)(2) of the Act.[422] NAA argues that section 274(c)(2)(C) permits a BOC to market jointly with an electronic publishing joint venture subject to the restrictions in section 274(b)(6) on use of names and trademarks.[423] In addition, NAA contends that the use of the terms "carry out" in section 274(c)(1) and "provide" in section 274(c)(2)(C) was not intended to limit the services a BOC may perform for an electronic publishing joint venture.[424]

184. Conversely, Time Warner argues that a BOC is prohibited from jointly marketing its local exchange services with the electronic publishing services of an electronic publishing joint venture, and vice versa.[425] According to Time Warner, if a joint venture were permitted to jointly market its electronic publishing services with the BOC's local exchange services, "the ability to leverage the BOC's local exchange monopoly into the electronic publishing market would remain."[426]

185. Bell Atlantic contends that sections 274(b)(6) and (c)(2)(A) of the Act do not affect the right of a BOC to provide marketing services for an electronic publishing joint venture.[427] According to Bell Atlantic, the statute prohibits the joint venture, not the BOC,

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[420] Bell Atlantic at 7; BellSouth at 17; Joint Parties at 2; SBC at 12-13; USTA at 5.

[421] SBC at 14.

[422] Ameritech at 17.

[423] NAA at 6.

[424] *Id.* at 7.

[425] Time Warner at 25-26.

[426] *Id.* at 26.

[427] Bell Atlantic at 8-9.

from using the BOC's name, trademark or service marks.[428] To the extent the BOC is providing services to the joint venture, Bell Atlantic argues, it is free to use its own name, trademark and service marks.[429] Bell Atlantic also maintains that it is subject to the conditions on inbound telemarketing in section 274(c)(2)(A) of the Act to the extent it performs inbound telemarketing activities for a joint venture.[430]

c) Discussion

186. We conclude that section 274(c)(2)(C) provides an exception to the general joint marketing prohibitions imposed on BOCs in section 274(c)(1) of the Act. As some commenters point out, the introductory clause in section 274(c)(1) of the Act indicates that subsections (c)(1)(A) and (B) prohibit BOCs from carrying out certain types of joint marketing activities "[e]xcept as provided in [section 274(c)(2)]."[431] Therefore, while section 274(c)(1)(B) of the Act might otherwise be interpreted to prohibit a BOC from carrying out joint marketing activities with an electronic publishing joint venture, section 274(c)(2)(C) provides a clear exception that allows a BOC to engage in such activities. In particular, section 274(c)(2)(C) of the Act expressly permits a BOC participating in an electronic publishing joint venture to provide "promotion, marketing, sales or advertising personnel and services" to such joint venture.[432]

187. Given the plain language of section 274(c)(2)(C), which allows a BOC participating in an electronic publishing joint venture to provide "promotion, marketing, sales or advertising *personnel* and services" to such joint venture,[433] we agree with SBC that an electronic publishing joint venture may be staffed by BOC marketing and sales personnel. Moreover, we agree with NAA that use of the terms "carry out" in section 274(c)(1) and "provide" in section 274(c)(2)(C) was not intended to limit the services a BOC may perform for an electronic publishing joint venture. To the contrary, based on the more specific language of the statute, which allows BOC provision of marketing *personnel* as well as services, we conclude that section 274(c)(2)(C) contemplates a broader range of BOC marketing activities than those proscribed in section 274(c)(1) of the Act.

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[428] *Id.* at 9.

[429] *Id.*

[430] *Id.*

[431] 47 U.S.C. § 274(c)(1).

[432] *Id.* § 274(c)(2)(C).

[433] *Id.* (emphasis added).

188. We also conclude that section 274(c)(2)(C) does not override the general prohibition in section 274(b)(6) of the Act on the use of "name, trademarks, or service marks of an existing [BOC]" by an electronic publishing joint venture and a BOC for the marketing of any product or service of the joint venture. Nothing in section 274 of the Act indicates that Congress intended section 274(c)(2)(C) to provide an exception to the broad restriction in section 274(b)(6) on the use of an existing BOC's name, trademarks and service marks. As such, to the extent a BOC engages in marketing activities permissible under section 274(c)(2)(C) of the Act, it must still comply with section 274(b)(6), as well as all other applicable provisions in section 274. For example, we agree with Bell Atlantic that a BOC is subject to the conditions in section 274(c)(2)(A) of the Act to the extent it performs inbound telemarketing activities for an electronic publishing joint venture.

D. Nondiscrimination Safeguards

1. Background

189. Section 274(d) requires a BOC "under common ownership or control with a separated affiliate or electronic publishing joint venture [to] provide network access and interconnections for basic telephone service to electronic publishers at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation) and that are not higher on a per-unit basis than those charged for such services to any other electronic publisher or any separated affiliate engaged in electronic publishing."[434] Prior to the Act, electronic publishing services were regulated as enhanced services and were subject to the nondiscrimination requirements established under the Commission's *Computer II*[435] and *Computer III* regimes.[436] Under *Computer III* and *Open Network Architecture*,[437] BOCs have

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[434] *Id.* § 274(d).

[435] *Amendment of Section 64.702 of the Commission's Rules and Regulations ("Computer II")*, 77 FCC 2d 384 (1980) ("*Final Order*"), *recon.*, 84 FCC 2d 50 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[436] *Amendment of Section 64.702 of the Commission's Rules and Regulations ("Computer III")*, CC Docket No. 85-229, *Phase I*, 104 FCC 2d 958 (1986) ("*Phase I Order*"), *recon.*, 2 FCC Rcd 3035 (1987) ("*Phase I Reconsideration Order*"), *further recon.*, 3 FCC Rcd 1135 (1988) ("*Phase I Further Reconsideration Order*"), *second further recon.*, 4 FCC Rcd 5927 (1989) ("*Phase I Second Further Reconsideration Order*"); Phase II, 2 FCC Rcd 3072 (1987) ("*Computer III Phase II Order*"), *recon.*, 3 FCC Rcd 1150 (1988) ("*Phase II Reconsideration Order*"), *further recon.*, 4 FCC Rcd 5927 (1989) ("*Phase II Further Reconsideration Order*"); *Computer III Remand Proceeding*, 5 FCC Rcd 7719 (1990) ("*ONA Remand Order*"), *recon.*, 7 FCC Rcd 909 (1992); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) ("*BOC Safeguards Order*").

[437] *See Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1 (1988) ("*BOC ONA Order*"), *recon.*, 5 FCC Rcd 3084 (1990) ("*BOC ONA Reconsideration Order*"); 5 FCC Rcd 3103 (1990) ("*BOC ONA Amendment Order*"), *erratum*, 5 FCC Rcd 4045, *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993), *recon.*, 8 FCC Rcd 97 (1993) ("*BOC ONA Amendment Reconsideration Order*"); 6 FCC Rcd 7646

been permitted to provide enhanced services on an integrated basis. Moreover, BOCs have been required to provide at tariffed rates nondiscriminatory interconnection to unbundled network elements used to provide enhanced services.[438]

190. We concluded in the *Notice* that the *Computer III/ONA* requirements should continue to apply to the extent that such requirements are not inconsistent with the Act.[439] We sought comment on whether the requirements of *Computer III/ONA* are consistent with the nondiscrimination requirements of section 274(d).[440] To the extent that commenters argue that the *Computer III/ONA* requirements are inconsistent, we sought comment on whether and to what extent regulations are necessary to implement section 274(d).[441]

191. We also tentatively concluded in the *Notice* that section 274(d) prohibits BOCs under common ownership or control with a separated affiliate or electronic publishing joint venture from providing volume discounts, term discounts, or other preferential rates for basic telephone service to electronic publishers.[442] In reaching this tentative conclusion, we reasoned that any such discount would be unlawful because section 274(d) prohibits BOCs from providing basic telephone services to some electronic publishers at rates that are "higher on a per-unit basis" than rates charged to other electronic publishers.[443] We also tentatively concluded that section 274(d) does not require BOCs to file tariffs for services that no longer are subject to tariff regulation.[444] Finally, we sought comment on the meaning of the requirement that access and interconnection be provided to electronic publishers "at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation)."[445]

(1991) ("*BOC ONA Further Amendment Order*"); 8 FCC Rcd 2606 (1993) ("*BOC ONA Second Further Amendment Order*"), *pet. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (collectively referred to as the *ONA Proceeding*).

[438] *See Computer III*, 104 FCC 2d 958.

[439] *Notice* at ¶ 65.

[440] *Id.*

[441] *Id.* at ¶¶ 64-65.

[442] *Id.* at ¶ 67.

[443] *Id.*; 47 U.S.C. § 274(d).

[444] *Notice* at ¶ 67.

[445] *Id.*; 47 U.S.C. § 274(d).

2. Comments

192. The parties generally agree that the language of section 274(d) is sufficiently clear and that there is no need for the Commission to adopt additional rules to implement this provision of the statute.[446] If the Commission nonetheless adopts rules to implement section 274(d), Cincinnati Bell would exempt "any LEC with less than 2% of the nation's access lines."[447] MCI contends that the BOCs, in complying with section 274(d), must provide competitors with "functional equality or service of equal quality relative to the services the BOCs provide their affiliates."[448]

193. In addition, the commenters generally agree that the *Computer III/ONA* nondiscrimination requirements are consistent with section 274(d),[449] but they disagree on whether we should continue to apply these requirements to BOC intraLATA electronic publishing services.[450] Some of the BOCs argue that application of the *Computer III/ONA* requirements is unnecessary because section 274 imposes a separate affiliate requirement on BOCs that is similar to the structural separation requirements of *Computer II*.[451] Ameritech supports elimination of the *Computer III/ONA* requirements, claiming that they "were, and are, simply a solution in search of a problem."[452] Other commenters, in contrast, support retaining the *Computer III/ONA* requirements.[453] Time Warner argues that, although the *Computer III/ONA* requirements "have not been useful to enhanced service providers," these requirements will be more effective if combined with the structural separation and

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[446] Bell Atlantic at 11; BellSouth at 21; Cincinnati Bell at 2-3; NYNEX at 24; NYNEX Reply at 15-16; PacTel at 20-21; PacTel Reply at 16; SBC at 17; USTA at 5-6; YPPA at 10; YPPA Reply at 9.

[447] Cincinnati Bell at 6.

[448] MCI at 7.

[449] *See, e.g.*, MCI at 6-7; PacTel at 20.

[450] *See, e.g.*, Ameritech Reply at 18-19; AT&T at 21-22; AT&T Reply at 21-22; BellSouth at 21; BellSouth Reply at 17; MCI at 6-7; MCI Reply at 7-8; NYNEX at 24; NYNEX Reply at 16-17; PacTel at 20-21; PacTel Reply at 14-15; Time Warner at 22. We note that the *Computer III/ONA* requirements do not distinguish between interLATA and intraLATA information services; however, prior to the Act the BOCs effectively were precluded from providing information services on an interLATA basis pursuant to the MFJ. *See Notice* at ¶ 4, n.7.

[451] BellSouth Reply at 17; NYNEX at 24; NYNEX Reply at 16-17; PacTel at 20-21; PacTel Reply at 14-15.

[452] Ameritech Reply at 18-19.

[453] AT&T at 21-22; AT&T Reply at 21-22; BellSouth at 21; MCI at 6-7; MCI Reply at 7-8; Time Warner at 22.

nondiscrimination requirements of section 274.[454] MCI and AT&T observe that there is no evidence that Congress intended to displace the *Computer III/ONA* requirements for electronic publishing services, although MCI states that the requirements are "inadequate to prevent discrimination."[455]

194. With regard to preferential rates, AT&T and Time Warner agree with our tentative conclusion that section 274(d) prohibits BOCs under common ownership or control with a separated affiliate or electronic publishing joint venture from providing volume and term discounts for network access and interconnections for basic telephone service to electronic publishers.[456] They contend that, because the rates charged to one electronic publisher must not be higher on a "per-unit basis" than the rates charged to other electronic publishers, the statute requires uniform rates for such services.[457] A number of BOCs, on the other hand, argue that volume and term discounts are permitted so long as the BOC offers the same discount to other electronic publishers on the same terms and conditions.[458]

195. PacTel also argues that Congress did not define the term "units" for purposes of calculating per-unit rates.[459] PacTel notes that it provides transport in units such as DSO, DS1, and DS3,[460] which are priced differently based on its cost savings.[461] PacTel further asserts that a group of minutes of use, when sold together as a block, could constitute a unit, which presumably would cost less than buying the minutes of use individually.[462] It thus asserts that BOCs may continue to create reasonable units or groups of services, and must only offer such units to all electronic publishers at the same price.[463]

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[454] Time Warner at 22.

[455] AT&T at 22; AT&T Reply at 21; MCI Reply at 7.

[456] AT&T Reply at 20-21; Time Warner at 21-22.

[457] *Id.*

[458] Bell Atlantic at 11; NYNEX Reply at 18.; PacTel at 22; USTA at 6.

[459] PacTel at 22.

[460] DSO, DS1 and DS3 refer to transmission facilities with varying degrees of capacity. A DSO link is a 64 kbps channel. A DS1 link has 24 times the carrying capacity of a DSO link. A DS3 link has 28 times the capacity of a DS1 link.

[461] PacTel at 22.

[462] *Id.*

[463] *Id.*

196. Time Warner also argues that the requirement that rates be just and reasonable and nondiscriminatory should apply independently of any decision to reduce or eliminate tariff filing requirements.[464] In order to enforce this requirement in the event of detariffing, Time Warner contends that the Commission should require BOCs to file with the Commission, and furnish to any electronic publisher upon request, a list of rates charged to electronic publishers.[465] Several BOCs, on the other hand, argue that filing a rate list is unnecessary because, under section 274(b)(3)(B), if a particular service is not subject to tariffing requirements, the transaction must be reduced to writing and made publicly available.[466] Moreover, some commenters note that, since section 274(d) does not require BOCs to file tariffs for services that are no longer subject to tariff filing requirements, a separate rate list requirement would be both inconsistent with the statute and overly regulatory.[467]

197. PacTel and YPPA further argue that, once the rates for basic telephone service are no longer subject to regulation, section 274(d) is no longer applicable.[468] These commenters contend that the Commission detariffs services when it determines that competition will keep rates just and reasonable, and therefore that the market, rather than tariff filings or other regulatory requirements, will ensure that rates are just and reasonable.[469]

3. Discussion

198. We decline to adopt rules to implement section 274(d), based on the record before us; we will reconsider this decision if circumstances warrant. We find that the language of section 274(d) is sufficiently clear to ensure that BOCs provide unaffiliated electronic publishers with network access and interconnections for basic telephone service that are equal in quality, and at nondiscriminatory terms, relative to those it provides to electronic publishers affiliated with the BOC. We reject MCI's contention, however, that section 274(d) is a guarantee of functional equivalence for unaffiliated electronic publishers.[470] We find that neither the statute nor its legislative history supports such an interpretation.

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[464] Time Warner at 22.

[465] *Id.*

[466] Bell Atlantic at 12; NYNEX Reply at 18; PacTel Reply at 16.

[467] PacTel at 21; PacTel Reply at 16; USTA at 6.

[468] PacTel Reply at 16; YPPA at 10.

[469] *Id.*

[470] MCI at 7.

199. We also conclude that the *Computer III/ONA* requirements are consistent with the requirements of section 274(d).[471] The parties have not indicated that there is any inconsistency between the nondiscrimination requirements of *Computer III/ONA* and section 274(d). Section 274(d), moreover, does not repeal or otherwise affect the *Computer III/ONA* requirements.

200. We recognize, however, that section 274(b) imposes certain structural separation requirements on BOC provision of electronic publishing services. Under our current regulatory regime, a BOC must comply fully with the *Computer II* separate subsidiary requirements in providing an information service to be relieved of the obligation to file a Comparably Efficient Interconnection (CEI) plan to provide that service on an integrated basis pursuant to *Computer III*. The record in this proceeding, however, is insufficient to support a finding, as NYNEX proposes,[472] that BOC electronic publishing services that are offered through a section 274 separated affiliate satisfy all the relevant requirements of *Computer II*. Instead, we will consider this issue, as well as issues raised regarding the revision or elimination of the *Computer III/ONA* requirements,[473] in the context of the *Computer III Further Remand* proceeding.[474] We conclude, therefore, that *Computer II, Computer III,* and *ONA* requirements continue to govern the BOCs' provision of intraLATA electronic publishing services. We also note that the nondiscrimination requirements of section 274(d) apply to the BOCs' provision of both intraLATA and interLATA electronic publishing

201. We further conclude that section 274(d) prohibits preferential rates, including volume or term discounts. This section expressly requires that a BOC under common ownership or control with a separated affiliate or electronic publishing joint venture must provide other electronic publishers network access and interconnections for basic telephone service at rates "that are not higher on a per-unit basis than those charged for such services" to its own affiliates or other competing electronic publishers.[475] We conclude from the plain language of the statute that Congress intended that BOCs under common ownership or control

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[471] *See, e.g.,* MCI at 6-7; PacTel at 20.

[472] *See* NYNEX at 24.

[473] *See, e.g.,* Ameritech Reply at 18-19; BellSouth Reply at 17; NYNEX at 24; NYNEX Reply at 16-17; PacTel at 20-21; PacTel Reply at 14-15.

[474] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services,* Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*"Computer III Further Remand"*).

[475] 47 U.S.C. § 274(d).

with a separated affiliate or electronic publishing joint venture must charge electronic publishers a uniform per-unit rate for a service.[476]

202. We conclude, however, that section 274(d) only prohibits discounts for network access and interconnections for basic telephone service used in the provision of electronic publishing services. Thus, under this section, BOCs may offer discounts for the provision of such services to an electronic publisher for use in any of its other non-electronic publishing activities. Otherwise, an entity that engages in electronic publishing as well as other activities would be prohibited from obtaining a volume discount or term discount for any basic telephone service it purchases for any of its activities, whether or not related to its electronic publishing services. There is no indication that Congress intended to prohibit such discounts for an electronic publisher's non-electronic publishing activities, thereby putting such electronic publisher at a competitive disadvantage vis-a-vis its non-electronic publishing competitors.

203. Moreover, we find that section 274(d) does not require a BOC under common ownership or control with a separated affiliate or electronic publishing joint venture to charge electronic publishers the same per-unit price for different services, particularly when those services use different facilities and impose different costs on the BOCs. Ignoring such cost disparities for providing different services would remove the incentive to use the most efficient service and could increase costs for all electronic publishers as well as hamper competition in the electronic publishing market.

204. We agree with PacTel that the statute does not define the term "units," for purposes of calculating per-unit rates.[477] BOCs, therefore, may charge a flat rate or, in the alternative, a rate based on usage for a service, each of which would have a different base

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[476] We find further support for this interpretation in a floor statement that Congressman Hyde made regarding the purpose of the amendment that contained the "not higher on a per-unit basis" language:

> In the development of the manager's amendment to be offered by Chairman Bliley, the Judiciary Committee has worked closely with the Commerce Committee to improve H.R. 1555 in areas that are of particular concern to, and under the jurisdiction of the Judiciary Committee. . . . Under the manager's amendment, *the Bell companies will be required to provide services to small electronic publishers at the same per-unit prices that they give to larger publishers.* This will allow the small newspapers and other electronic publishers to bring the information superhighway to rural areas that might otherwise be passed by.

141 Cong. Rec. H8292-93 (daily ed. Aug. 2, 1995) (statement of Rep. Hyde, Chairman of the House Committee on the Judiciary) (emphasis added).

[477] PacTel at 22.

unit.[478] We reject, however, PacTel's argument that a group of minutes of use, for example, could constitute a unit, unless such a group of minutes is both the smallest unit of minutes offered to electronic publishers and accommodates the needs of small electronic publishers. In this manner, such a group of minutes would neither constitute a volume discount nor disadvantage small electronic publishers.

205. We also adopt our tentative conclusion that section 274(d) does not require BOCs to file tariffs for services that are not subject to rate regulation. Section 274(d) is clear that BOCs subject to the requirements in this section file tariffs for services only "so long as rates for such services are subject to regulation."[479] No commenter disagrees with this conclusion.

206. In addition, we reject the argument that, because competition will be sufficient to ensure that a detariffed service's rates are just and reasonable, section 274(d) is inapplicable to such services. We find that the "just and reasonable" and "per-unit" requirements in section 274(d) are independent of the requirement that rates be tariffed "so long as rates for such services are subject to regulation."[480] Thus, the section 274(d) nondiscrimination requirements will continue to apply, regardless of whether the service is tariffed or no longer subject to regulation, until the sunset date of this provision in February, 2000.

[illegible] Commission should require BOCs to file rates for network access and interconnections for basic telephone service provided to electronic publishers even after elimination of tariff filing requirements. We note that BOCs currently are required to file state and federal tariffs for ONA services, which are the tariffed services generally used by enhanced service providers, such as electronic publishers, to provide their services to customers.[481] The Commission will determine whether additional filing or regulatory requirements are necessary if and when a service that is currently subject to tariff filing requirements is detariffed. Further, several BOCs stated that section 274(b)(3)(B) eliminates the need for additional regulatory requirements because under that section, if a particular service is not subject to tariffing requirements, the transaction between a BOC and its separated affiliate or joint venture must

[478] A service sold at a flat rate could be charged, for example, on a per-month basis regardless of actual usage, while a rate based on usage could be sold on a per-minute basis.

[479] 47 U.S.C. § 274(d).

[480] *Id.*

[481] *See BOC ONA Amendment Order*, 5 FCC Rcd at 3105, ¶ 13 (1990); *BOC Safeguards Order*, 6 FCC Rcd at 7624 n.212; *BOC ONA Order*, 4 FCC Rcd at 116-71, ¶¶ 224-325.

be pursuant to a written contract that is publicly available.[482] As discussed below, we are issuing a *Further Notice* in this proceeding to seek additional comments on the meaning of section 274(b)(3)(B).[483]

IV. TELEMESSAGING

A. Application of Sections 260 and 272 to BOC InterLATA Telemessaging Services

1. Background

208. We stated in our *Notice* that section 260 sets forth various requirements for the provision of telemessaging service by LECs subject to the requirements of section 251(c), *i.e.*, incumbent LECs.[484] The Commission's current rules permit BOCs to provide telemessaging services on an integrated basis, subject to the *Computer III/ONA* requirements. Other LECs have been permitted to provide telemessaging services subject only to the requirements of sections 201 and 202, which apply to all common carriers, including the BOCs. The *Notice* also recognized that section 260 does not distinguish between intraLATA and interLATA provision of telemessaging services.[485] We therefore sought comment on whether section 260 applies to BOC provision of telemessaging services, both on an intraLATA and interLATA basis.[486] We also noted that, in the *Non-Accounting Safeguards Notice*, we tentatively concluded that telemessaging is an information service subject to the separate affiliate and nondiscrimination requirements of section 272 and, therefore, we tentatively concluded that BOC provision of interLATA telemessaging services is subject to the requirements of section 272 in addition to the requirements of section 260.[487] We sought comment on whether, if we decided not to adopt this tentative conclusion, BOCs providing telemessaging services on either an intraLATA or interLATA basis would be subject only to the requirements of section 260.[488]

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[482] Bell Atlantic at 12; NYNEX Reply at 18; PacTel Reply at 16; *see also* 47 U.S.C. § 274(b)(3)(B) (providing that a BOC and its separated affiliate or electronic publishing joint venture must carry out transactions "pursuant to written contracts or tariffs that are filed with the Commission and made publicly available").

[483] *See infra* part VII.B.

[484] *See* 47 U.S.C. § 260(a). Our discussion in this Order is limited to sections 260(a)(2) and (c), which concern non-accounting safeguards and definitional issues. We address sections 260(a)(1) and 260(b), which concern accounting safeguards and enforcement issues, respectively, in separate proceedings. *See* ¶ 2 *supra.*

[485] *Notice* at ¶ 75.

[486] *Id.*

[487] *Id.*

[488] *Id.*

2. Comments

209. Commenters generally agree that section 260 applies to all incumbent LEC provision of telemessaging, both on an intraLATA and interLATA basis.[489] Commenters disagree, however, on whether BOC provision of interLATA telemessaging services is subject to both sections 272 and 260.[490] MCI, U S WEST, and Voice-Tel state that BOC provision of interLATA services is subject to both sections 272 and 260, because telemessaging service is an "information service" and thus falls within the terms of section 272(a)(2)(C).[491] BellSouth and PacTel agree with this point, but argue that Congress, in enacting a separate provision for telemessaging services, did not intend BOC provision of interLATA telemessaging services to be subject to the requirements of section 272.[492]

3. Discussion

210. We conclude that section 260 applies to all incumbent LEC provision of telemessaging services, both on an intraLATA and interLATA basis. We find that neither the statute nor its legislative history evinces an intent by Congress to distinguish between BOCs and other LECs, or between intraLATA and interLATA services. Moreover, because we concluded in the Commission's *Non-Accounting Safeguards Order* that telemessaging service is an "information service," BOC provision of telemessaging service on an interLATA basis is subject to the requirements of section 272 in addition to the requirements of section 260.[493]

B. Definition of "Telemessaging Service"

1. Background

211. Section 260(c) defines "telemessaging service" as "voice mail and voice storage and retrieval services, any live operator services used to record, transcribe, or relay messages (other than telecommunications relay services), and any ancillary services offered in combination with these services."[494] We sought comment in the *Notice* on whether rules are

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[489] AT&T at 5-6; AT&T Reply at 8; Bell Atlantic at 14; MCI Reply at 12.

[490] *Compare* MCI at 7; MCI Reply at 11-12; U S WEST Reply at 15-16; and Voice-Tel at 11; *with* BellSouth at 25-26 and PacTel Reply at 19-20.

[491] MCI at 7-8; MCI Reply at 11-12; U S WEST at 31; U S WEST Reply at 15-16; Voice-Tel at 11.

[492] BellSouth at 25-26; PacTel Reply at 19-20.

[493] *Non-Accounting Safeguards Order* at ¶ 145.

[494] 47 U.S.C. § 260(c).

necessary to clarify any ambiguities in this definition.[495] We also sought comment on the types of services contemplated by the term "ancillary services."[496]

2. Comments

212. None of the commenters identifies any ambiguities in the definition of "telemessaging service" in section 260(c). Some commenters state generally that the language of section 260 is clear and that no rules are needed to implement this provision.[497] ATSI states that "ancillary services" are "all value-added services in addition to those primary [telemessaging] services, offered by telemessagers to the communications customer."[498] ATSI lists specific examples, but recommends against establishing a comprehensive list of primary or ancillary telemessaging services, since new services are created as technology and consumer demands change.[499]

3. Discussion

213. We conclude that the definition of "telemessaging service" in section 260(c) is sufficiently clear and therefore decline to establish an exclusive list of "telemessaging services" or "ancillary services."[500] We will determine whether any individual service is a "telemessaging service" or "ancillary service" as necessary on a case-by-case basis.

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[495] *Notice* at ¶ 76.

[496] *Id.*

[497] Bell Atlantic at 1-2, 14-15; PacTel at 23; SBC at 3; USTA at 6; USTA Reply at 1-2.

[498] ATSI at 6.

[499] *See* ATSI at 6; *see also* Voice-Tel at 4.

[500] We note that BellSouth asks us to clarify that live operator services do not fall within the Commission's definition of "enhanced" services, because they do not employ "computer processing applications." *See* BellSouth at 26. We concluded in the *Non-Accounting Safeguards Order* that live operator services "are an example of one area in which the 'information service' definition is broader than that of 'enhanced services.'" *Non-Accounting Safeguards Order* at ¶ 145 n.342.

C. Nondiscrimination Requirements

1. Section 260(a)(2) and Sections 201 and 202

a. Background

214. Section 260(a)(2) provides that an incumbent LEC "shall not prefer or discriminate in favor of its telemessaging service operations in its provision of telecommunications services."[501] We sought comment in the *Notice* on the extent to which section 260(a)(2) imposes greater obligations on LECs providing telemessaging services than currently exist under sections 201 and 202 of the Act.[502]

b. Comments

215. Some commenters assert that section 260(a)(2) imposes greater obligations on LECs providing telemessaging services than currently exist under sections 201 and 202 of the Act, based on the broad, unqualified language in section 260(a)(2).[503] Some of the BOCs, however, disagree, asserting that section 260(a)(2) merely duplicates the requirements of sections 201 and 202 for incumbent LEC provision of telemessaging services.[504] Voice-Tel contends that, in complying with section 260(a)(2), "it is not sufficient for the interconnections offered to be comparable, if they put the competitor at any disadvantage."[505]

c. Discussion

216. As noted above, section 260(a)(2) states that an incumbent LEC "shall not prefer or discriminate in favor of its telemessaging service operations in its provision of telecommunications services."[506] Section 202(a), in contrast, prohibits "any unjust or unreasonable discrimination . . . , or . . . any undue or unreasonable preference or advantage" by common carriers providing interstate communications services.[507] Because the section 260(a)(2) nondiscrimination bar, unlike that of section 202(a), is not qualified by the terms

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501 47 U.S.C. § 260(a)(2).

502 *Notice* at ¶ 77.

503 ATSI at 6-7; ATSI Reply at 3; AT&T at 7-8; AT&T Reply at 6-7, n.14; Voice-Tel at 4-7, 10.

504 NYNEX Reply at 18-19; PacTel at 23; PacTel Reply at 19; SBC at 22.

505 Voice-Tel at 6.

506 47 U.S.C. § 260(a)(2).

507 *Id.* § 202(a).

"unjust and unreasonable," we conclude that Congress did not intend section 260(a)(2) to be synonymous with the nondiscrimination standard in section 202(a), but intended a more stringent standard. This conclusion is consistent with our interpretation of similar language in sections 251(c)(2) and 272(c)(1).[508] We therefore reject claims that section 260(a)(2) merely duplicates the nondiscrimination bar of section 202(a) for the provision of telemessaging services by incumbent LECs.[509]

217. We also conclude that section 260(a)(2) is not a guarantee of functional equivalence for unaffiliated telemessaging providers, as Voice-Tel contends.[510] We find that neither the statute nor its legislative history supports such an interpretation. We note that the Joint Explanatory Statement states only that section 260(a)(2) prohibits incumbent LECs "from discriminating against nonaffiliated entities with respect to the terms and conditions of any network services they provide to their own telemessaging operations."[511] To the extent that competitors require different telecommunications services than the LEC provides to its own telemessaging operations, we note that other nondiscrimination requirements in the Act and analogous state nondiscrimination laws may apply to such requests.[512] In addition, the Commission's *ONA* rules require the BOCs and GTE to unbundle network services useful to enhanced service providers.[513]

2. Section 260(a)(2) and *Computer III/ONA* Requirements

a. Background

218. We concluded in the *Notice* that the nondiscrimination requirements of *Computer III/ONA* should continue to apply to the extent they are not inconsistent with section 260(a)(2).[514] We sought comment on whether the nondiscrimination provisions of *Computer III/ONA* are consistent with section 260(a)(2), and whether these provisions should

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[508] *See, e.g., First Interconnection Order* at 15612, ¶ 217; *Non-Accounting Safeguards Order* at ¶ 197.

[509] *See* AT&T Reply at 7 n.14.

[510] Voice-Tel at 6.

[511] Joint Explanatory Statement at 138.

[512] *See, e.g.,* 47 U.S.C. § 201(a) (providing that "[i]t shall be the duty of every common carrier engaged in interstate . . . communication . . . to furnish such communication service upon reasonable request").

[513] *See BOC ONA Order* at 12, 15-16, 207-08, ¶¶ 4, 14, 397-97; *Phase I Order* at 1019-20, ¶ 113.

[514] *Notice* at ¶ 77.

be applied only to the BOCs or to all incumbent LECs to fulfill the requirements of section 260(a)(2).[515]

b. Comments

219. Most commenters agree that the *Computer III/ONA* nondiscrimination requirements are consistent with section 260(a)(2) and assert that these requirements should continue to apply to BOC intraLATA telemessaging services.[516] MCI and AT&T observe that there is no evidence that Congress intended to displace the *Computer III/ONA* requirements for telemessaging services.[517] Similarly, ATSI asserts that "[s]ection 260 is not limited by existing rules or other provisions of the Act."[518] The commenters disagree, however, on whether the current scope of the *Computer III/ONA* requirements should be extended to include all incumbent LECs, not just the BOCs. Cincinnati Bell asserts that the *Computer III/ONA* requirements should not be extended beyond their current scope,[519] while PacTel and U S WEST argue that they should be extended to include all incumbent LECs.[520] AT&T would extend the *Computer III/ONA* requirements to all incumbent LECs "possess[ing] substantial market power as a result of [their] bottleneck control over local exchange facilities in a significant service area (*e.g.*, SNET, GTE, and other Tier I LECs),"[521] while USTA would exempt small and mid-sized LECs from these requirements.[522]

220. Several commenters argue that the *Computer III/ONA* requirements should be revised or eliminated. Although MCI supports continued application of the *Computer III/ONA* requirements, it states that they "are inadequate to prevent access discrimination."[523] Ameritech supports elimination of the *Computer III/ONA* requirements, claiming that they

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[515] *Id.*

[516] ATSI at 6-7; ATSI Reply at 4; AT&T at 8-9; AT&T Reply at 7-8; BellSouth at 26; BellSouth Reply at 5-6; MCI at 7-8; MCI Reply at 7-8, 15; PacTel at 23; PacTel Reply at 19-20; *but see* Bell Atlantic at 14-15; U S WEST at 34; Voice-Tel at 6.

[517] AT&T at 9; MCI Reply at 7; *see also* ATSI Reply at 4.

[518] ATSI at 6-7.

[519] Cincinnati Bell at 6-7.

[520] PacTel at 23; U S WEST at 34.

[521] AT&T at 9; AT&T Reply at 8-9.

[522] USTA at 6-7.

[523] MCI at 7-8; MCI Reply at 8.

"were, and are, simply a solution in search of a problem."[524] Bell Atlantic argues that the *Computer III/ONA* rules are unnecessary, given that price caps and sections 202(a) and 251 "fully protect against discrimination."[525]

c. Discussion

221. We conclude that the *Computer III/ONA* requirements are consistent with the requirements of section 260(a)(2). We affirm our conclusion, therefore, that *Computer III/ONA* requirements continue to govern the BOCs' provision of intraLATA telemessaging services.[526] We also note that the nondiscrimination requirements of section 260(a)(2) apply to the BOCs' provision of both intraLATA and interLATA telemessaging services, as well as other incumbent LECs' provision of telemessaging services. The parties have not indicated that there is any inconsistency between the nondiscrimination requirements of *Computer III/ONA* and section 260(a)(2). Section 260(a)(2), moreover, does not repeal or otherwise affect the *Computer III/ONA* requirements. We will consider in the Commission's *Computer III Further Remand* proceeding whether the *Computer III/ONA* requirements need to be revised or eliminated. For the same reason, we also decline to extend the *Computer III/ONA* requirements to entities other than BOCs, as recommended by some commenters.

3. Section 260(a)(2) and Adoption of Rules

a. Background

222. We sought comment in the *Notice* on whether and what types of specific regulations may be necessary to implement section 260(a)(2).[527]

b. Comments

223. The BOCs argue that the language of section 260(a)(2) is sufficiently clear and thus there is no need for the Commission to adopt rules to implement this provision.[528] ATSI and Voice-Tel, on the other hand, argue that the Commission should adopt rules to implement

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[524] Ameritech Reply at 18-19.

[525] Bell Atlantic at 14-15.

[526] In addition, we note that the Commission's *Computer II* requirements also continue to govern BOC provision of intraLATA information services, including telemessaging.

[527] *Notice* at ¶ 77.

[528] Bell Atlantic at 15; BellSouth at 26; Cincinnati Bell at 3, 7; PacTel at 23; SBC at 1-3, 22; USTA at 6; U S WEST at 34.

section 260(a)(2).[529] Voice-Tel states that Commission rules will ensure that complaints of discrimination are treated consistently and will help the Commission administer the Act efficiently.[530] SBC argues that any rules adopted by the Commission must apply to all incumbent LECs,[531] while Cincinnati Bell would exempt any LEC with less than two percent of the nation's access lines.[532]

224. Voice-Tel argues that the "broad language" of the nondiscrimination requirement in section 260(a)(2) "makes *any* discrimination in pricing or other behavior unlawful," including the marketing of voice messaging services.[533] Some BOCs, on the other hand, argue that the scope of section 260(a)(2) is limited to the provision of "telecommunications services," which, as defined in section 3(46) of the Act, does not include marketing-related activities.[534]

225. Voice-Tel also would require all incumbent LECs to establish a separate affiliate to provide telemessaging services, in order to ensure that incumbent LECs comply with section 260(a)(2).[535] Voice-Tel claims that nothing in the Act prevents the Commission from imposing this measure.[536] The BOCs argue, in contrast, that, if Congress had intended to establish a separate affiliate requirement, it would have expressly said so, as it did for certain information services in section 272 and for electronic publishing services in section 274.[537]

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[529] ATSI at 7; ATSI Reply at 4; Voice-Tel at 10-11.

[530] Voice-Tel at 9.

[531] SBC at 22.

[532] Cincinnati Bell at 6.

[533] Voice-Tel at 6.

[534] Bell Atlantic Reply at 11; BellSouth Reply at 6; NYNEX Reply at 19; PacTel Reply at 20; SBC Reply at 23; USTA Reply at 2; U S WEST Reply at 16-17.

[535] Voice-Tel at 11-12.

[536] *Id.*

[537] BellSouth Reply at 5-6; PacTel Reply at 19; SBC Reply at 23-24; USTA Reply at 2-3; U S WEST Reply at 15-16. *See* Bell Atlantic Reply at 10-12.

c. Discussion

226. We conclude that no rules are necessary to implement section 260(a)(2), based on the record before us; we will reconsider this decision if circumstances warrant. We therefore decline to adopt the specific rules proposed by certain commenters.[538]

227. In particular, we decline to impose a separate affiliate requirement on all incumbent LECs providing telemessaging services. We find that the safeguards expressly established by Congress in section 260 are sufficient to guard against discriminatory behavior by incumbent LECs in favor of their own telemessaging operations. In addition, we find it significant that Congress limited the separate affiliate requirement in section 272 to BOC provision of interLATA information services (including interLATA telemessaging services), interLATA telecommunications services, and manufacturing, and in section 274 to BOC provision of electronic publishing services.

228. Further, we conclude that the scope of section 260(a)(2) is limited, by its terms, to the provision of "telecommunications services," which, as defined in section 3(46) of the Act, does not include marketing-related activities. Accordingly, we reject Voice-Tel's argument that marketing is included within the scope of 260(a)(2).[539]

V. FINAL REGULATORY FLEXIBILITY CERTIFICATION

229. The Commission certified in the *Notice* that the conclusions it proposed to adopt would not have a significant economic impact on a substantial number of small entities because the proposed conclusions did not pertain to small entities.[540] No comments were submitted in response to the Commission's request for comment on its certification. For the reasons stated below, we certify that the conclusions adopted herein will not have a significant economic impact on a substantial number of small entities.[541] This certification conforms to the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[542]

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[538] ATSI at 7-8; ATSI Reply at 4; Voice-Tel at 10-11.

[539] Voice-Tel at 6-7, 10-11.

[540] *Notice* at ¶ 87.

[541] 5 U.S.C. § 605(b).

[542] 5 U.S.C. §§ 601-611. SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).

230. The RFA provides that the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[543] The Small Business Act defines a "small business concern" as one that is independently owned and operated; is not dominant in its field of operation; and meets any additional criteria established by the Small Business Administration (SBA).[544] SBA has not developed a definition of "small incumbent LECs." The closest applicable definition under SBA rules is for Standard Industrial Classification (SIC) code 4813 (Telephone Communications, Except Radiotelephone).[545] The SBA has prescribed the size standard for a "small business concern" under SIC code 4813 as 1,500 or fewer employees.[546]

231. The conclusions we adopt in this *Order* to implement section 274 apply only to the BOCs which, because they are large corporations that are dominant in their field of operation and have more than 1,500 employees, do not fall within the SBA's definition for a "small business concern." The conclusions we adopt pursuant to section 260, however, apply to all incumbent LECs. Some of these incumbent LECs may have fewer than 1,500 employees and thus meet the SBA's size standard to be considered "small." Because such incumbent LECs, however, are either dominant in their field of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definition of "small entity" and "small business concerns."[547] Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs.[548] Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."

232. With respect to section 260, the most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS). According to our most recent data, 1,347 companies reported that they were engaged in the provision of local

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[543] 5 U.S.C. § 601(3). The term "small entity" is a generic term encompassing the terms "small business," "small organization," and "small governmental jurisdiction" under the RFA. *See* 5 U.S.C. § 601(6).

[544] 15 U.S.C. § 632(a)(1).

[545] *See Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual* 282 (1987) (stating that SIC code 4813 includes "[e]stablishments primarily engaged in furnishing telephone voice and data communications . . . [or] leasing . . . methods of telephone transmission . . . and reselling . . . to others").

[546] 13 C.F.R. § 121.201.

[547] *See First Interconnection Order* at 16144-45, 16150, ¶¶ 1328-30, 1342.

[548] *See id.* 16150, ¶ 1342.

exchange services.[549] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the conclusions adopted in this *Order*.

233. The Commission adopts the conclusions in this *Order* to ensure the prompt implementation of sections 260 and 274 of the Act. Section 260 permits incumbent LECs, including the BOCs, to provide telemessaging service subject to certain nondiscrimination safeguards. We certify that although there may be a substantial number of small incumbent LECs affected by the conclusions adopted in this *Order* to implement section 260, these conclusions will not have a significant economic impact on those affected small incumbent LECs.

234. We decline to elaborate on the definition of "telemessaging service" prescribed by Congress or to establish a list of services that fall within section 260(c), for the reasons set forth in Part IV.B. Because we take no action pursuant to section 260(c) in this *Order*, there will be no significant economic impact on a substantial number of small entities.

235. Our conclusion that section 260(a)(2) imposes a more stringent standard for determining whether discrimination is unlawful than that which already exists under sections 201 and 202 and applies to all incumbent LECs[550] will not have a significant economic impact on small incumbent LECs. Incumbent LECs, including small incumbent LECs, are subject to other nondiscrimination requirements in the Act and state law and therefore already are required to respond to complaints of discriminatory behavior or limit their participation in discriminatory activities. We therefore find that the impact on incumbent LECs, including small incumbent LECs, of the more stringent standard of section 260(a)(2) will most likely be minimal.

236. Our decision not to extend the *Computer III/ONA* nondiscrimination requirements to all incumbent LECs, as well as our decision not to adopt rules implementing the nondiscrimination requirement of section 260(a)(2), as noted in Section IV.C, will prevent any significant economic impact on incumbent LECs, particularly small incumbent LECs. Thus, although their conduct will be subject to the requirements of section 260, small incumbent LECs will be spared the regulatory burdens and economic impact of complying with additional rules.

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[549] Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996).

[550] *See supra* ¶¶ 210, 216.

237. Section 274 of the Act allows BOCs to provide electronic publishing service disseminated by means of its basic telephone service only through a "separated affiliate" or an "electronic publishing joint venture" that meets the separation, joint marketing, and nondiscrimination requirements prescribed by that section. BOCs that were offering electronic publishing services at the time the 1996 Act was enacted have until February 8, 1997, to meet those requirements, which expire on February 8, 2000. Because section 274 applies only to BOCs, which, as noted above, do not fall within the SBA's definition for a "small business concern," the conclusions we adopt in this *Order* implementing this section have no significant economic impact on a substantial number of small entities.

238. The Commission shall send a copy of this certification, along with this *Order*, in a report to Congress pursuant to the SBREFA, 5 U.S.C. § 801(a)(1)(A). A copy of this certification will also be provided to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register.

VI. FINAL PAPERWORK REDUCTION ANALYSIS

239. As required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13,[551] the *Notice* invited the general public and the OMB to comment on proposed changes to the Commission's information collection requirements contained in the *Notice*.[552] Specifically, the Commission proposed to extend various reporting requirements, which apply to the BOCs under *Computer III*, to all incumbent LECs pursuant to section 260(a)(2). OMB approved all of the proposed changes to the Commission's information collection requirements in accordance with the Paperwork Reduction Act.[553] In approving the proposed changes, OMB "encourage[d] the [Commission] to investigate the potential for sunsetting these requirements as competition and other factors allow."[554]

240. In this *Order*, the Commission adopts none of the changes to our information collection requirements proposed in the *Notice*. We therefore need not address the OMB's comment, although we note that our decision is consistent with the OMB's recommendation.

241. We conclude, however, that to the extent a BOC refers a customer to a separated affiliate, electronic publishing joint venture or affiliate during the normal course of its telemarketing operations, the BOC must refer that customer to all unaffiliated electronic publishers requesting the referral service, on nondiscriminatory terms. As part of this requirement, BOCs must provide the names of all such unaffiliated electronic publishers, as

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551 44 U.S.C. §§ 3501 *et seq.*

552 *Notice* at ¶ 88.

553 *Notice of Office of Management and Budget Action*, OMB No. 3060-0738 (Sep. 27, 1996).

554 *Id.*